

_____ BILL NO. _____

INTRODUCED BY _____

(Primary Sponsor)

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE WATER USE ACT; REVISING THE USE OF WATER PRODUCED IN ASSOCIATION WITH A COAL BED METHANE WELL FOR IRRIGATION; PROVIDING THAT THE WITHDRAWAL OF WATER IN ASSOCIATION WITH A COAL BED METHANE WELL IS AN APPROPRIATION AND A BENEFICIAL USE; PROVIDING THAT A PERSON THAT APPLIES FOR MORE THAN ONE PERMIT THAT RESULTS IN A TOTAL APPROPRIATION OF 4,000 OR MORE ACRE-FEET MUST MEET ADDITIONAL CRITERIA; PROVIDING THAT A PERSON THAT APPLIES FOR MORE THAN ONE PERMIT THAT RESULTS IN A TOTAL APPROPRIATION OF GROUND WATER OF MORE THAN 3,000 ACRE-FEET MUST MEET ADDITIONAL CRITERIA; AMENDING SECTIONS 82-11-175, 85-2-102, 85-2-311, 85-2-317, AND 85-2-505, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 82-11-175, MCA, is amended to read:

"82-11-175. Coal bed methane wells -- requirements. (1) Coal bed methane production wells that involve the production of ground water must comply with this section.

(2) Ground water produced in association with a coal bed methane well must be managed in any of the following ways:

(a) (i) used as irrigation or stock water or for other beneficial uses in compliance with Title 85, chapter 2, part 3; or

(ii) used as irrigation water if the rate of application is consistent with the agronomic demands of the crop or rangeland and the water once applied will not result in the accumulation of sodium salts derived from the water in soils inside or outside the state;

(b) reinjected to an acceptable subsurface strata or aquifer pursuant to applicable law;

(c) discharged to the surface or surface waters subject to the permit requirements of Title 75, chapter 5; or

(d) managed through other methods allowed by law.

(3) (a) Prior to the development of a coal bed methane well that involves the production of ground water from an aquifer that is a source of supply for appropriation rights or permits to appropriate under Title 85, chapter 2, the developer of the coal bed methane well shall notify and offer a reasonable mitigation agreement to each appropriator of water who holds an appropriation right or a permit to appropriate under Title 85, chapter 2, that is for ground water and for which the point of diversion is within:

(i) 1 mile of the coal bed methane well; or

(ii) one-half mile of a well that is adversely affected by the coal bed methane well.

(b) The mitigation agreement must address the reduction or loss of water resources and must provide for prompt supplementation or replacement of water from any natural spring or water well adversely affected by the coal bed methane well. The mitigation agreement is not required to address a loss of water well productivity that does not result from a reduction in the amount of available water because of production of ground water from the coal bed methane well."

Section 2. Section 85-2-102, MCA, is amended to read:

"85-2-102. (Temporary) Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Appropriate" means:

(a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial use;

(b) in the case of a public agency, to reserve water in accordance with 85-2-316;

(c) in the case of the department of fish, wildlife, and parks, to lease water in accordance with 85-2-436;

or

(d) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the fishery resource in accordance with 85-2-408; or

(e) the withdrawal of water in association with coal bed methane production.

(2) "Beneficial use", unless otherwise provided, means:

(a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power, and recreational uses;

(b) a use of water appropriated by the department for the state water leasing program under 85-2-141

1 and of water leased under a valid lease issued by the department under 85-2-141;

2 (c) a use of water by the department of fish, wildlife, and parks pursuant to a lease authorized under
3 85-2-436; ~~or~~

4 (d) a use of water through a temporary change in appropriation right or lease to enhance instream flow
5 to benefit the fishery resource in accordance with 85-2-408; or

6 (e) a use of water through the withdrawal of ground water in association with a coal bed methane well.

7 (3) "Certificate" means a certificate of water right issued by the department.

8 (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the
9 purpose of use, or the place of storage.

10 (5) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

11 (6) "Correct and complete" means that the information required to be submitted conforms to the standard
12 of substantial credible information and that all of the necessary parts of the form requiring the information have
13 been filled in with the required information.

14 (7) "Declaration" means the declaration of an existing right filed with the department under section 8,
15 Chapter 452, Laws of 1973.

16 (8) "Department" means the department of natural resources and conservation provided for in Title 2,
17 chapter 15, part 33.

18 (9) "Developed spring" means any artificial opening or excavation in the ground, however made,
19 including any physical alteration at the point of discharge regardless of whether it results in any increase in the
20 yield of ground water, from which ground water is sought or can be obtained or through which it flows under
21 natural pressures or is artificially withdrawn.

22 (10) "Existing right" or "existing water right" means a right to the use of water that would be protected
23 under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water
24 rights created under federal law and water rights created under state law.

25 (11) "Ground water" means any water that is beneath the ground surface.

26 (12) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of
27 abandonment under 85-2-226.

28 (13) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303
29 and 85-2-306 through 85-2-314.

30 (14) (a) "Person" means an individual, association, partnership, limited liability partnership, limited liability

1 company, corporation, state agency, political subdivision, the United States or any agency of the United States,
2 or any other entity.

3 (b) The term also includes a subsidiary in which 50% or more of the ownership is held by an individual,
4 association, partnership, limited liability partnership, limited liability company, or corporation.

5 (15) "Political subdivision" means any county, incorporated city or town, public corporation, or district
6 created pursuant to state law or other public body of the state empowered to appropriate water. The term does
7 not mean a private corporation, association, or group.

8 (16) "Salvage" means to make water available for beneficial use from an existing valid appropriation
9 through application of water-saving methods.

10 (17) "State water reservation" means a water right created under state law after July 1, 1973, that
11 reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water
12 throughout the year or at periods or for defined lengths of time.

13 (18) "Substantial credible information" means probable, believable facts sufficient to support a reasonable
14 legal theory upon which the department should proceed with the action requested by the person providing the
15 information.

16 (19) "Waste" means the unreasonable loss of water through the design or negligent operation of an
17 appropriation or water distribution facility or the application of water to anything but a beneficial use.

18 (20) "Water" means all water of the state, surface and subsurface, regardless of its character or manner
19 of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

20 (21) "Water division" means a drainage basin as defined in 3-7-102.

21 (22) "Water judge" means a judge as provided for in Title 3, chapter 7.

22 (23) "Water master" means a master as provided for in Title 3, chapter 7.

23 (24) "Watercourse" means any naturally occurring stream or river from which water is diverted for
24 beneficial uses. It does not include ditches, culverts, or other constructed waterways.

25 (25) "Well" means any artificial opening or excavation in the ground, however made, by which ground
26 water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn.
27 (Terminates June 30, 2009--sec. 9, Ch. 123, L. 1999.)

28 **85-2-102. (Effective July 1, 2009) Definitions.** Unless the context requires otherwise, in this chapter,
29 the following definitions apply:

30 (1) "Appropriate" means:

1 (a) to divert, impound, or withdraw, including by stock for stock water, a quantity of water for a beneficial
2 use;

3 (b) in the case of a public agency, to reserve water in accordance with 85-2-316; ~~or~~

4 (c) temporary changes or leases for instream flow to maintain or enhance instream flow to benefit the
5 fishery resource in accordance with 85-2-408; or

6 (d) the withdrawal of water in association with coal bed methane production.

7 (2) "Beneficial use", unless otherwise provided, means:

8 (a) a use of water for the benefit of the appropriator, other persons, or the public, including but not limited
9 to agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal, power,
10 and recreational uses;

11 (b) a use of water appropriated by the department for the state water leasing program under 85-2-141
12 and of water leased under a valid lease issued by the department under 85-2-141; ~~or~~

13 (c) a use of water through a temporary change in appropriation right or lease to enhance instream flow
14 to benefit the fishery resource in accordance with 85-2-408; or

15 (d) a use of water through the withdrawal of ground water in association with a coal bed methane well.

16 (3) "Certificate" means a certificate of water right issued by the department.

17 (4) "Change in appropriation right" means a change in the place of diversion, the place of use, the
18 purpose of use, or the place of storage.

19 (5) "Correct and complete" means that the information required to be submitted conforms to the standard
20 of substantial credible information and that all of the necessary parts of the form requiring the information have
21 been filled in with the required information.

22 (6) "Declaration" means the declaration of an existing right filed with the department under section 8,
23 Chapter 452, Laws of 1973.

24 (7) "Department" means the department of natural resources and conservation provided for in Title 2,
25 chapter 15, part 33.

26 (8) "Developed spring" means any artificial opening or excavation in the ground, however made,
27 including any physical alteration at the point of discharge regardless of whether it results in any increase in the
28 yield of ground water, from which ground water is sought or can be obtained or through which it flows under
29 natural pressures or is artificially withdrawn.

30 (9) "Existing right" or "existing water right" means a right to the use of water that would be protected

under the law as it existed prior to July 1, 1973. The term includes federal non-Indian and Indian reserved water rights created under federal law and water rights created under state law.

(10) "Ground water" means any water that is beneath the ground surface.

(11) "Late claim" means a claim to an existing right forfeited pursuant to the conclusive presumption of abandonment under 85-2-226.

(12) "Permit" means the permit to appropriate issued by the department under 85-2-301 through 85-2-303 and 85-2-306 through 85-2-314.

(13) (a) "Person" means an individual, association, partnership, limited liability partnership, limited liability company, corporation, state agency, political subdivision, the United States or any agency of the United States, or any other entity.

(b) The term also includes a subsidiary in which 50% or more of the ownership is held by an individual, association, partnership, limited liability partnership, limited liability company, or corporation.

(14) "Political subdivision" means any county, incorporated city or town, public corporation, or district created pursuant to state law or other public body of the state empowered to appropriate water. The term does not mean a private corporation, association, or group.

(15) "Salvage" means to make water available for beneficial use from an existing valid appropriation through application of water-saving methods.

(16) "State water reservation" means a water right created under state law after July 1, 1973, that reserves water for existing or future beneficial uses or that maintains a minimum flow, level, or quality of water throughout the year or at periods or for defined lengths of time.

(17) "Substantial credible information" means probable, believable facts sufficient to support a reasonable legal theory upon which the department should proceed with the action requested by the person providing the information.

(18) "Waste" means the unreasonable loss of water through the design or negligent operation of an appropriation or water distribution facility or the application of water to anything but a beneficial use.

(19) "Water" means all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, and sewage effluent.

(20) "Water division" means a drainage basin as defined in 3-7-102.

(21) "Water judge" means a judge as provided for in Title 3, chapter 7.

(22) "Water master" means a master as provided for in Title 3, chapter 7.

(23) "Watercourse" means any naturally occurring stream or river from which water is diverted for beneficial uses. It does not include ditches, culverts, or other constructed waterways.

(24) "Well" means any artificial opening or excavation in the ground, however made, by which ground water is sought or can be obtained or through which it flows under natural pressures or is artificially withdrawn."

Section 3. Section 85-2-311, MCA, is amended to read:

"85-2-311. Criteria for issuance of permit. (1) A permit may be issued under this part prior to the adjudication of existing water rights in a source of supply. In a permit proceeding under this part there is no presumption that an applicant for a permit cannot meet the statutory criteria of this section prior to the adjudication of existing water rights pursuant to this chapter. In making a determination under this section, the department may not alter the terms and conditions of an existing water right or an issued certificate, permit, or state water reservation. Except as provided in subsections (3) and (4), the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

1 (d) the proposed use of water is a beneficial use;

2 (e) the applicant has a possessory interest, or the written consent of the person with the possessory
3 interest, in the property where the water is to be put to beneficial use;

4 (f) the water quality of a prior appropriator will not be adversely affected;

5 (g) the proposed use will be substantially in accordance with the classification of water set for the source
6 of supply pursuant to 75-5-301(1); and

7 (h) the ability of a discharge permitholder to satisfy effluent limitations of a permit issued in accordance
8 with Title 75, chapter 5, part 4, will not be adversely affected.

9 (2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met
10 only if a valid objection is filed or if the water is produced in association with a coal bed methane well. A valid
11 objection must contain substantial credible information establishing to the satisfaction of the department that the
12 criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection
13 (1)(g), only the department of environmental quality or a local water quality district established under Title 7,
14 chapter 13, part 45, may file a valid objection.

15 (3) The department may not issue a permit for an appropriation of 4,000 or more acre-feet of water a
16 year and 5.5 or more cubic feet per second of water or a combination of one or more permits to a person for a
17 total appropriation of 4,000 or more acre-feet of water a year and 5.5 or more cubic feet per second of water
18 unless the applicant proves by clear and convincing evidence that:

19 (a) the criteria in subsection (1) are met;

20 (b) the proposed appropriation is a reasonable use. A finding must be based on a consideration of the
21 following:

22 (i) the existing demands on the state water supply, as well as projected demands, such as reservations
23 of water for future beneficial purposes, including municipal water supplies, irrigation systems, and minimum
24 streamflows for the protection of existing water rights and aquatic life;

25 (ii) the benefits to the applicant and the state;

26 (iii) the effects on the quantity and quality of water for existing beneficial uses in the source of supply;

27 (iv) the availability and feasibility of using low-quality water for the purpose for which application has been
28 made;

29 (v) the effects on private property rights by any creation of or contribution to saline seep; and

30 (vi) the probable significant adverse environmental impacts of the proposed use of water as determined

1 by the department pursuant to Title 75, chapter 1, or Title 75, chapter 20.

2 (4) (a) The state of Montana has long recognized the importance of conserving its public waters and the
3 necessity to maintain adequate water supplies for the state's water requirements, including requirements for
4 federal non-Indian and Indian reserved water rights held by the United States for federal reserved lands and in
5 trust for the various Indian tribes within the state's boundaries. Although the state of Montana also recognizes
6 that, under appropriate conditions, the out-of-state transportation and use of its public waters are not in conflict
7 with the public welfare of its citizens or the conservation of its waters, the criteria in this subsection (4) must be
8 met before out-of-state use may occur.

9 (b) The department may not issue a permit for the appropriation of water for withdrawal and
10 transportation for use outside the state unless the applicant proves by clear and convincing evidence that:

11 (i) depending on the volume of water diverted or consumed, the applicable criteria and procedures of
12 subsection (1) or (3) are met;

13 (ii) the proposed out-of-state use of water is not contrary to water conservation in Montana; and

14 (iii) the proposed out-of-state use of water is not otherwise detrimental to the public welfare of the citizens
15 of Montana.

16 (c) In determining whether the applicant has proved by clear and convincing evidence that the
17 requirements of subsections (4)(b)(ii) and (4)(b)(iii) are met, the department shall consider the following factors:

18 (i) whether there are present or projected water shortages within the state of Montana;

19 (ii) whether the water that is the subject of the application could feasibly be transported to alleviate water
20 shortages within the state of Montana;

21 (iii) the supply and sources of water available to the applicant in the state where the applicant intends to
22 use the water; and

23 (iv) the demands placed on the applicant's supply in the state where the applicant intends to use the
24 water.

25 (d) When applying for a permit or a lease to withdraw and transport water for use outside the state, the
26 applicant shall submit to and comply with the laws of the state of Montana governing the appropriation, lease, and
27 use of water.

28 (5) To meet the preponderance of evidence standard in this section, the applicant, in addition to other
29 evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other
30 evidence, including but not limited to water supply data, field reports, and other information developed by the

1 applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and
2 other specific field studies.

3 (6) An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion,
4 impoundment, use, or restraint contrary to the provisions of this section is invalid. An officer, agent, agency, or
5 employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation,
6 diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally
7 or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or
8 control waters within the boundaries of this state except in accordance with this section.

9 (7) The department may not issue a permit for land application, including irrigating at a rate that exceeds
10 the agronomic demands of the plants being irrigated, as a means of disposing of water produced in association
11 with a coal bed methane well.

12 ~~(7)~~(8) The department may adopt rules to implement the provisions of this section."
13

14 **Section 4.** Section 85-2-317, MCA, is amended to read:

15 **"85-2-317. Limitation on appropriation of ground water.** (1) After July 1, 1991, the department may
16 not approve a permit to appropriate ground water in excess of 3,000 acre-feet ~~per a year~~ or a combination of one
17 or more permits to a person for a total appropriation of 3,000 or more acre-feet of water a year unless:

18 (a) the applicant proves and the department finds that the applicable criteria in 85-2-311 are met; and

19 (b) the department then petitions the legislature and the legislature affirms the decision of the department
20 after one or more public hearings.

21 (2) Subsection (1) applies to any permit to appropriate ground water for which application has been
22 made but which has not been granted as of May 7, 1979.

23 (3) This section does not apply to appropriations by municipalities for municipal use or to appropriations
24 for public water supplies as defined in 75-6-102 or to appropriations for the irrigation of cropland owned and
25 operated by the applicant within the state of Montana.

26 (4) Any person, association, corporation, or other entity that applies for a permit or multiple permits to
27 appropriate ground water, singularly or collectively, for the purpose of circumventing this section is punishable
28 by a fine not exceeding \$5,000."
29

30 **Section 5.** Section 85-2-505, MCA, is amended to read:

1 **"85-2-505. Waste and contamination of ground water prohibited.** (1) ~~No ground~~ Ground water may

2 not be wasted. The department shall require all wells producing waters that contaminate other waters to be
3 plugged or capped. It shall also require all flowing wells to be ~~so~~ capped or equipped with valves so that the flow
4 of water can be stopped when the water is not being put to beneficial use. ~~Likewise, both flowing~~ Flowing and
5 nonflowing wells must be ~~so~~ constructed and maintained ~~as~~ to prevent the waste, contamination, or pollution of
6 ground water through leaky casings, pipes, fittings, valves, or pumps either above or below the land surface.
7 However, in the following cases the withdrawal or use of ground water may not be construed as waste under this
8 part:

9 (a) the withdrawal of reasonable quantities of ground water in connection with the construction,
10 development, testing, or repair of a well or other means of withdrawal of ground water;

11 (b) the inadvertent loss of ground water owing to breakage of a pump, valve, pipe, or fitting, if reasonable
12 diligence is shown by the person in effecting the necessary repair;

13 (c) the disposal of ground water without further beneficial use that must be withdrawn for the sole
14 purpose of improving or preserving the utility of land by draining the ~~same~~ ground water or that must be removed
15 from a mine to permit mining operations or to preserve the mine in good condition;

16 (d) the disposal of ground water used in connection with producing, reducing, smelting, and milling
17 metallic ores and industrial minerals or that displaced from an aquifer by the storage of other mineral resources;
18 and

19 (e) ~~the management, discharge, or reinjection of ground water produced in association with a coal bed~~
20 ~~methane well in accordance with 82-11-175(2)(b) through (2)(d).~~

21 (2) The department at any time may hold a hearing on its own motion or upon petition signed by a
22 representative body of users of ground water in any area or subarea to determine whether the water supply within
23 that area or subarea is used in compliance with this part."
24

25 NEW SECTION. **Section 6. Effective date.** [This act] is effective on passage and approval.

26
27 NEW SECTION. **Section 7. Applicability.** [This act] applies to applications pending with the department
28 of natural resources and conservation on [the effective date of this act] and to applications filed on or after [the
29 effective date of this act].
30

- END -